NO. 80-730

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT L. HELERINGER..... Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION..... Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

May an attorney be publically reprimanded by the Supreme Court of Kentucky for public attribution of "highly unethical and grossly unfair" behavior to a named sitting judge, a charge that the attorney knew, or should have known, was unwarranted, was unethical and unprofessional conduct tending to bring the bench and bar into disrepute and would undermine public confidence in the integrity of the judicial process?

CONSTITUTIONAL PROVISIONS AND REGULATIONS

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abriding the freedom of speech, or of the press; or the right of the people peaceably to assembly, and petition the government for a redress of grievances.

KENTUCKY SUPREME COURT RULE 3.130:

RULE 3.130 ABA CODES OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CONDUCT RECOGNIZED AS AUTHORITY

(1) Except for Ethical Considerations and Disciplinary Rules insofar as they conflict with the opinion in the United States Supreme Court in Bates v. State Bar of Arizona, the court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.

(2) The Code of Judicial Conduct shall be regarded as the standard of professional conduct for a member of the bar seeking or holding a judicial office or serving as a commissioner of a court. The board

may cause to be tried all charges for unprofessional or unethical conduct tending to bring the bench and bar into disrepute irrespective of any action by the Retirement and Removal Commission.

(Amended effective January 1, 1978; January 1, 1980.)

RULES 65.03, KENTUCKY RULES OF CIVIL PROCEDURE:

A restraining order may be granted at the commencement of an action, or during the pendency thereof, without notice, if it is clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before notice can be served and a hearing had thereon.

AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY:

DR 1-102(A)(5) A lawyer shall not engage in conduct that is prejudicial to the administration of justice.

DR 8-102(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

STATEMENT OF THE CASE

On August 9, 1979, the Inquiry Tribunal of the Kentucky Bar Association issued a charge against petitioner alleging that he had engaged in unethical and

unprofessional conduct tending to bring the bench and bar of Kentucky into disrepute. The charge is set forth in its entirety in the Petition for Writ of Certiorari, pages A-13 and A-14.

On August 13, 1979, petitioner filed a letter with the Director of the Kentucky Bar Association demanding to know the specific provisions of the American Bar Association's Code of Professional Responsibility which he was charged with violating. Petitioner's letter was treated as a motion for a more definite statement of the charge. On August 14, 1979, the Kentucky Bar Association filed a response to the letter or motion which stated: (1) that bar disciplinary proceedings under Kentucky law are not adversary in nature but rather are fact finding inquiries into what may constitute unethical conduct; (2) that pursuant to Rule 3.130 of the Supreme Court of Kentucky, petitioner could be charged with any violations of the American Bar Association's Code of Professional Responsibility as well as any other conduct tending to bring the bench and bar into disrepute; and (3) that the charge included but was not limited to violations of Disciplinary Rules 1-102(A) (6) and 8-102 (B) as amplified by Ethical Considerations 8-6, 9-2 and 9-6 of the Code.

Petitioner filed an answer to the charge on August 17, 1979, denying that he had engaged in unethical conduct. Petitioner admitted he had stated at a public press conference that the circuit judge's actions were "highly unethical and grossly unfair." On the same day respondent also filed a motion for a hearing before a trial commissioner.

The Inquiry Tribunal determined that petitioner's answer to the charge did not raise any issues of fact but it decided to grant petitioner's motion for a hearing. On August 23, 1979, a trial commissioner was appointed to conduct an evidentiary hearing. The hearing was held on

November 28, 1979, and the trial commissioner filed his report on January 2, 1980, containing his advisory findings of fact.

The parties filed briefs. On March 22, 1980, the Board of Governors of the Kentucky Bar Association, by a vote of 12 to 1 with one member abstaining, found petitioner guilty as charged and recommended to the Supreme Court of Kentucky that petitioner be publicly reprimanded. The minutes and the opinion of the Board of Governors are set forth in their entirety in the Petition for Writ of Certiorari, pages A-7 through A-12.

The record was submitted to the Supreme Court of Kentucky on May 15, 1980. Petitioner filed a motion for review and a supporting brief with the Supreme Court of Kentucky. The Kentucky Bar Association filed a brief in response and on July 15, 1980, the Supreme Court of Kentucky rendered its detailed opinion affirming the decision of the Board of Governrs to publicly reprimand petitioner. The opinion of the Supreme Court of Kentucky is set forth in its entirety in the Petition for Writ of Certiorari, pages A-1 through A-6.

Petitioner did not file a petition for rehearing. On August 5, 1980, the Supreme Court of Kentucky entered a final mandate publicly reprimanding petitioner. The Supreme Court of Kentucky subsequently entered an order on September 19, 1980, granting a motion by petitioner to stay the execution and enforcement of the mandate for a period of ninety days to permit petitioner to petition for a Writ of Certiorari to the Supreme Court of the United States.

ARGUMENT

The facts in this case are clearly stated in the charge filed by respondent and can be found in the Petition for Writ of Certiorari, Appendix, pages A-13 through A-14.

The facts are again stated in detail in the opinion of the Board of Governors and the per curiam opinion of the Supreme Court of Kentucky set forth in full in the Petitioner's Appendix, pages A-7 and A-1 through A-2, respectfully, and need not be recited here. The facts are admitted by petitioner.

Petitioner's objection to the circuit judge's actions was that he conducted a hearing on the motion for a restraining order in an ex parte fashion without a representative from the Jefferson County Attorney's office being present to speak in favor of the ordinance. However, petitioner, as an attorney, either knew or should have known that under Rule 65.03 of the Kentucky Rules of Civil Procedure, a circuit court can issue a restraining order ex parte. In this particular instance, the circuit judge had made every effort to schedule a hearing on the motion so that all parties could be afforded notice and an opportunity to be heard prior to the issuance of any restraining order.

If petitioner believed that the circuit judge's conduct was so shocking and so unethical, he had another forum available to him in which to seek redress. Petitioner could also have filed a complaint against the circuit judge with the state Judicial Retirement and Removal Commission SCR 4.300. Instead, petitioner chose to publicly assail the judge at a news conference.

The Supreme Court of Kentucky has recognized the American Bar Association's Code of Professional Responsibility (hereinafter referred to as Code) as establishing a standard of professional conduct which every member of the bar is required to observe. SCR 3.130. The Court has also provided that attorneys may be disciplined for engaging in "other unprofessional or unethical conduct tending to bring the bench and bar into disrepute." SCR 3.130.

EC 9-2 of the Code provides, in part:

> When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC 9-6 of the Code provides that every lawyer has a solemn duty "to encourage respect for the law and for the courts and judges thereof. . ."

DR 8-102 (B) of the Code provides: "A lawyer shall not knowingly make a false accusation against a judge or other adjudicatory officer."

EC 8-6 provides, in part:

> While a lawyer as a citizen has a right to criticize such officials (judges) publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified. (Emphasis added)

Petitioner has raised the defense that his statements accusing the circuit judge of "highly unethical and grossly unfair" conduct are protected under the state and federal constitutions guarantee of free speech. An attorney, both as a citizen and as an officer of the court has a constitutional right to criticize in properly respectful terms and through legitimate means the acts of courts and judges. A person does not forfeit his right to freedom of speech when he becomes an attorney at law and the Kentucky Bar Association through a disciplinary proceeding does not seek or desire to unnecessarily inhibit or restrict petitioner's exercise of his right to freedom of speech. However, this does not mean that an attorney may indulge in unfounded and offensive criticism of the courts and judges. Unlike the ordinary citizen, every

attorney faces an added responsibility to the court for any abuse of his ethical duties as an officer of the court. There are limits to freedom of speech. In the case of *Kentucky State Bar Association vs. Martin,* Ky., 282 S.W. 2d 321 (1955), the Supreme Court of Kentucky stated:

> Freedom of speech is not a license. It is a right or a privilege constitutionally guaranteed, but he who uses it as a license to degrade another does so at his peril. He must be prepared to prove the truth of his charges. Of course any attorney, as well as any other citizen, has the right to criticize the Courts and their decisions but the publication of false and scurrilous matters subjects them to disciplinary action. Thatcher v. United States, 6 Cir., 212 F. 801; State ex rel. Dabney v. Breckenridge, supra, 126 Okl. 86, 258 P. 744, 53 A.L.R. 1239; Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666. Id. at 326.

One of the leading cases in this area is **In Re Sawyer**, 360 U.S. 622 (1959). Sawyer represented a number of defendants who had been indicted and were being tried in the United States District Court for conspiracy under the Smith Act. Sawyer was charged with two counts of unethical conduct, one of which involved a public speech she made before a group of laymen. Sawyer spoke of the "horrible and shocking" things going on at the trial, the impossibility of a fair trial in a Smith Act Case, and the necessity of ignoring the rules of evidence if the government were to prove its case.

This Court held that Sawyer's speech could not subject her to discipline because it did not directly impugn the integrity and impartiality of the trial court but rather merely constituted permissible criticism of the Smith Act cases in general. Her references to the pending trial were deemed not to reflect on the trial

judge personally nor his conduct of the trial. At page 635 of the marjority opinion the Court stated:

> Even if some passages can be found which go so far as to imply that Judge Wiig was taking an erroneous view of the law. . . we think there was still nothing in the speech warranting the findings (that Sawyer had engaged in unethical conduct and should be disciplined). If Judge Wiig was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed. **Petitioner did not say Judge Wiig was corrupt of venal or stupid or incompetent.** The public attribution of honest error to the judiciary is not cause for professional discipline in this country. See Re Ades (DC Md) 6 F Supp 467, 481. (Emphasis supplied).

Mr. Justice Stewart concurred with the majority's holding that the charge against Sawyer had not been proven but he went on to discuss the issue of free speech under the First Amendment:

> A lawyer belongs to a profession which inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. Id. at 646-647.

Mr. Justice Frankfurter in an incisive dissenting opinion wrote:

> Time, place and circumstances determine the constitutional protection of utterance. . . but a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not

merely a person and not even merely a lawyer. . . It is hard to believe that this Court should hold a member of the legal professional is constitutionally entitled to remove his case from the Court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge. 'Legal trials', said this Court, 'are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper'. Bridges v. California, 314 U.S. 252, 271, 62 S.Ct. 190, 197. . .

An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not like for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this court, still exercises judicial power, those claims will be heard and heeded.

Certainly, courts are not, and cannot be, immune from criticism, and lawyers of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpens what he says but he imparts to his attack inflaming and warping significance. He says that the very court room into which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct

> are a sham. 'We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion'. In Re Howell, 10 N.J. 139, 142, 89 A.2d 652, 653 (concurring opinion). Id. at 668-669. (Emphasis supplied).

In the recent case of **In the Matter of Lacey**, 283 N.W. 2d 250 (S.D. 1979), Lacey represented taxpayers who sought to halt construction of a classroom building. In a newspaper article reporting that his clients would appeal an adverse decision to the United States Supreme Court, Lacey was quoted as saying, "The state courts were incompetent and sometimes downright crooked, Judge Adams excepted." Following publication of the newspaper article, the Chairman of the South Dakota Grievance Committee wrote a letter to Lacey who admitted that the foregoing quote was accurate. The Grievance Committee recommended disbarment and Lacey argued for dismissal of the charges against him on First Amendment grounds. The court publicly censured Lacey holding that his statement to the media violated both DR 8-102(B) of the Code and a court rule obligating attorneys to maintain "the respect due to the courts of justice and judicial officers." The court completely rejected Lacey's contention that his statements constituted legitimate and constructive criticism of the state courts. The court noted that Lacey could have filed his complaints with a state commission that regulated the conduct of judges but instead voiced his complaints in precisely the manner and forum that would most likely cast doubt upon the competence and integrity of the courts. In mitigation the court cited Lacey's fifty years of practice, public service, and deteriorating physical condition which limited his practice of law.

Petitioner accused the circuit judge of engaging in "highly unethical" conduct. In his answer to the charge

petitioner said that by using the term "unethical" he meant that in his opinion the judge had violated Section A(4) of Canon 3 of the American Bar Association's Code of Judicial Conduct. The Code of Judicial Conduct has been adopted by the Supreme Court of Kentucky under Rule 4.300 and Canon 3 Section 4(A) provides, in part:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. (Emphasis supplied).

Civil Rules 65.03 expressly provides that a circuit court has the authority to issue restraining orders ex parte. Because the subject matter of the motion for the restraining order, abortion, as an issue of great concern to many members of the public, the circuit judge had tried to accommodate all parties by scheduling a hearing on the motion. Respondent submits that when the Assistant County Attorney, Schoenbachler, was unable to appear, the judge clearly had every right legally and ethically, to hear the motion and to enter the restraining order so as to avoid any further delay in the criminal jury trial. No one was denied a legal right to their day in court because the judge did not decide the merits of the case.

Respondent submits that petitioner's actions at the press conference were extremely irresponsible in that he knew the issue of abortion was a subject giving rise to great emotion and controversy among a large segment of the citizens in Jefferson County. Petitioner either knew or should have known, that his statements to the media would serve to undermine public confidence in the integrity of the judicial process and would bring the bench and bar into disrepute.

As the Supreme Court of Kentucky so aptly stated in the case of *Kentucky State Bar Association v. Lewis,* 282 S.W. 2d 320 (1955):

> We are fully cognizant of the duties owed to his client by the attorney. He is bound to use every legitimate means and maneuver to protect the interests of his clients, and to obtain for them a fair trial. He should be zealous in his advocacy of his client's rights. On the other hand, he has a duty to the Court of which he is an officer. He owes it to himself as an attorney, to his profession, and to the Court to help maintain the dignity and decorum of the Court, and thus maintain the respect of the people for judicial process. **Id.** at 324.

Respondent finds the Sawyer case, to be directly in point and in support of the decision of the Board of Governors of the Kentucky Bar Association and the per curiam opinion of the Supreme Court of Kentucky noting that these writings cite and discuss the Sawyer case. Petitioner is clearly in error when he states that the per curiam opinion of the state court decided an important question of federal law in a way in conflict with the Sawyer decision. Quite to the contrary the "balancing standards" stated in the Sawyer decision were carefully and correctly applied by both the Spureme Court of Kentucky and the Board of Governors of the Kentucky Bar Association. Respondent is mindful of the first amendment rights of a lawyer to criticize the state of the law or even to state that a judge has not properly applied the law in a particular case. Respondent is also aware that the Kentucky Constitution, as amended in 1976, provides for a state Retirement and Removal Commission which can consider alleged improper conduct by a member of the judiciary and take appropriate action against the judge in the public interest. It is certainly the duty of the bar to complain in

the proper manner about unethical conduct on the part of a judge supported by reasonable evidence.

Unlike the Sawyer case, petitioner launched an attack on the character of a named circuit judge properly performing the duties of his office.

The majority of the Court in the Sawyer case found, as a matter of fact from a record subject to varying interpretations, that Sawyer's speech did not reflect in any way on the sitting judge personally, or his conduct of the trial. Re Sawyer, Id., page 628.

There is no doubt in the present case that petitioner, without substantial competent evidence, publicly stated that a named sitting judge of engaging in "highly unethical and grossly unfair" behavior. The Supreme Court of Kentucky specifically found that petitioner's statement was unwarranted. Petition for Writ of Certiorari, Appendix, page A-6. Petitioner's speech was not only degrading to the judge, but prejudiced the administration of justice.

Both the Supreme Court of Kentucky and the Board of Governors of the Kentucky Bar Association carefully, completely and properly considered the Sawyer decision, as well as the applicable sound case law of the State of Kentucky and sister jurisdictions. There are no facts in dispute. No matter has been overlooked nor errors made in interpreting all applicable case law, both state and federal. The ordering of a public reprimand to petitioner was done only after considering the sincerity of the petitioner, his relative inexperience at the bar, the emotional issue involved and Kentucky case law. The decision is just and fair. There are no justifiable reasons for granting the writ.

CONCLUSION

For the foregoing reasons, it is respectfully

submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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